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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of CLAUDIA and VICTOR MERAS, SANTA CLARA COUNTY CHILD SUPPORT SERVICES, Respondent, v. VICTOR MERAS, Appellant.	H034556 (Santa Clara County Super. Ct. No. FL126284)

I. INTRODUCTION

Appellant Victor Meras (Victor), a self-represented litigant, challenges the trial court's June 8, 2009 order granting the motion of respondent Santa Clara County Department of Child Support Services (Child Support Services) for modification of the previous child support order. Victor argues that the trial court erred in finding that he had an earning capacity of $4,000 per month and, on that basis, ordering him to pay monthly child support of $1,751 plus $49 towards his child support arrears. For the reasons stated below, we find that the order is not supported by substantial evidence of Victor's earning

capacity. Therefore, we will vacate the order and remand the matter for redetermination of Victor's child support obligation.

II. FACTUAL AND PROCEDURAL BACKGROUND

Victor and Claudia were married in 1993 and separated in 2003. They had five children, all of whom were minors at the time Claudia filed a petition for dissolution of marriage on April 26, 2005. An order to show cause for child support was also filed on April 26, 2005, in which Claudia sought an order requiring Victor to pay child support. Claudia's April 22, 2005 declaration in support of her request stated that Victor was currently serving a sentence at San Quentin State Prison on charges that included an assault on her. She asked that Victor be ordered to pay monthly child support of $1,000 upon his release from prison. A judgment of dissolution was filed on February 7, 2006, which reserved the issue of child support.

The record is unclear as to the date of Victor's release from prison. However, Victor filed a financial statement on March 17, 2008, stating that he was receiving unemployment compensation of $188 per month and a monthly disability benefit of $2,444. On June 19, 2008, Child Support Services filed a motion for modification of child support.[1] The motion noted that the February 6, 2006 judgment of dissolution had reserved the issue of child support, and requested that child support be ordered from the date of judgment. The motion also stated, "Current child support order is zero. Father has income from Social Security."

A hearing on Child Support Services' motion for modification of child support was held on July 17, 2008. Counsel for Child Support Services stated that child support

[1] The Family Code "authorize[s] the local district attorney to prosecute actions for child support in the name of the county on behalf of the child or children of the custodial parent, and to recover arrears in support payments. [Citation.]" (*In re Marriage of Smith* (2001) 90 Cal.App.4th 74, 78, fn. 1; §§ 4002, 17400, 17402, 17404.)

was sought for the four youngest children, since the oldest child did not reside with either parent. The trial court then inquired as to Victor's employment status. Victor responded that he was a journeyman bricklayer who normally obtained work through his union, but due to the recession he had not worked since January 2008. In February 2008, Victor began receiving unemployment benefits of $450 per week. At the time of the July 17, 2008 hearing, Victor was on parole, while Claudia and the four minor children were living in Florida, where Claudia earned $2,626 per month as a certified ophthalmic assistant. Based on this information, the trial court determined that a deviation from guideline child support was appropriate, and initially set child support in the amount of $800 per month, below the guideline amount of $1,100. When Victor objected, Claudia agreed to take less and the trial court issued an interim order requiring Victor to pay child support of $500 per month, commencing July 1, 2008. The interim order also included a "standard" employment efforts order and continued the matter to October 15, 2008, to review child support and Victor's employment efforts.

At the hearing held on October 15, 2008, the trial court heard Victor's testimony regarding his efforts to find employment, and found that he had not brought documentation of his efforts. The court clarified that the employment efforts order required Victor to look for 20 jobs per month and also ordered him to sign up with at least 10 employment agencies. Another hearing regarding Victor's employment efforts was set for January 26, 2009.

When Victor did not appear for the January 26, 2009 hearing, the trial court continued the matter to February 2, 2009. At that time, Victor presented documentation of his employment efforts, which consisted of a card indicating that he was registered for a training class to work in a refinery. Victor also stated that his efforts included trying to get a contractor's license and calling his union every week to be put on the out of work list.

Victor also testified during the February 2, 2009 hearing, "I'm a licensed contractor." The trial court then asked Victor "How much do you expect to be making as a sole proprietor, independent contractor, per month?" Victor replied, "I'm going to average at least $4,000--about $5,000. [¶] . . . [¶] Once I paid the license fees and get the contractor bond . . . ." The trial court then stated, "In the event that [Victor] does not have a full-time job at the next hearing, the court will impute $4,000 a month self-employment." The court then set a hearing date of June 8, 2009, to review Victor's employment efforts.

Victor appeared at the June 8, 2009 hearing and informed the court that he had not obtained a job and was currently receiving unemployment benefits. The trial court said, "I'll keep my promise to you, I'm going to impute $4,000 a month to you." After obtaining Claudia's current income and expenses, the trial court determined that monthly guideline child support, based on Victor's earning capacity of $4,000 per month, would be $1,751. Victor objected. He asserted that he had been released from parole a few days earlier, on June 3, 2009, and had sought work by registering with his union's weekly out of work list. Victor also stated that his application for a contractor's license had been denied because of his criminal record. However, Victor did not have proof that he had looked for any other type of job. He acknowledged that a union job would pay him $32 per hour and that in the past he had worked as a bricklayer for cash.

At the conclusion of the June 8, 2009 hearing, the trial court found that Victor had willfully failed to comply with the employment efforts order. The court ordered Victor to pay guideline child support of $1,751 based on his earning capacity of $4,000 per month, as well as $49 per month towards his child support arrears.[2] The court also stated, "You

[2] The June 8, 2009 order states that Victor's child support arrears as of June 8, 2009 totaled an "estimated" $3,313.00.

were warned that [this] was going to happen. [¶] Now, if you get a job and it turns out that you're not going to make $4,000, come on back, I'd be happy to reconsider."

Victor filed a timely notice of appeal from the June 8, 2009 order on August 6, 2009.

III. DISCUSSION

On appeal, Victor contends that the trial court's finding that he has an earning capacity of $4,000 per month was not based on substantial evidence, since he is unable to earn the projected self-employment income as a contractor. He further contends that the calculation of his monthly child support obligation should be based upon his unemployment benefits. Additionally, Victor claims that the trial court erred in calculating the amount of his child support arrears.

Child Support Services argues that Victor's appeal should be dismissed pursuant to the disentitlement doctrine, due to his failure to comply with the trial court's employment efforts orders. Alternatively, Child Support Services maintains that none of Victor's contentions has merit. As a threshold matter, we will first consider Child Support Services' request that the appeal be dismissed.

A. *Request for Dismissal of Appeal*

There is authority for the proposition that an appeal may be dismissed pursuant to the disentitlement doctrine. "Under the disentitlement doctrine a reviewing court applying equitable principles may exercise its inherent power to dismiss an appeal by a party who has refused to comply with trial court orders. [Citation.] 'The disentitlement doctrine is based on the equitable notion that a party to an action cannot seek the assistance of a court while the party "stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]" [Citation.] A formal judgment of contempt, however, is not a prerequisite to exercising our power to dismiss; rather, we may dismiss an appeal where there has been willful disobedience or obstructive tactics.' [Citation.]" (*In re Baby Boy M.* (2006) 141 Cal.App.4th 588, 596.)

Thus, application of the disentitlement doctrine is appropriate where the appellant is a fugitive who has refused to comply with court orders or to make an appearance despite being given notice and an opportunity to appear and be heard. (*In re Kamelia S.* (2000) 82 Cal.App.4th 1224, 1229.) The disentitlement doctrine has also been applied to dismiss appeals arising from, among other cases, juvenile dependency proceedings and cases involving child abduction, and where the appellant's conduct frustrated a party seeking information to protect his or her rights. (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 244-245.)

Child Support Services has provided no authority for the proposition that a supporting parent's appeal from a child support order may be dismissed under the disentitlement doctrine, where, as here, the supporting parent has appeared and is participating in the case, but has repeatedly failed to adequately demonstrate compliance with an employment efforts order. We decline Child Support Services' invitation to apply the disentitlement doctrine under these particular circumstances. Moreover, the issue of Victor's child support obligation may be properly resolved under the statutes governing child support in California. Therefore, we will reach the merits of Victor's appeal of the trial court's order granting Child Support Services' motion for modification of child support.

B. *Standard of Review*

The standard of review for an order granting or denying a request for modification of child support is abuse of discretion. (*Brothers v. Kern* (2007) 154 Cal.App.4th 126, 133; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947.) Where the appellant challenges the trial court's factual findings regarding earning capacity, "we review the findings for substantial evidence, considering the evidence in the light most favorable to the party who prevailed in the trial court. [Citation.]" (*Brothers v. Kern, supra*, 154 Cal.App.4th at p. 134.) If the trial court did not make express findings, "we imply all findings necessary to support the judgment, and our review is limited to whether there is

substantial evidence in the record to support these implied findings. [Citations.]" (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928 (*Cohn*).)

C. *Earning Capacity*

Since Victor's chief contention is that the trial court's finding that he has an earning capacity of $4,000 per month as a self-employed contractor is not supported by substantial evidence, we will review the rules governing the court's consideration of earning capacity in determining the amount of a monthly child support obligation.

The statewide uniform guideline found in Family Code sections 4050 through 4076[3] governs child support orders. Section 4053, subdivision (d) provides that "[i]n implementing the statewide uniform guideline, the courts shall adhere to the following principles: [¶] . . . [¶]: Each parent should pay for the support of the children according to his or her ability." In determining a parent's ability to pay child support, the trial court is authorized by section 4058, subdivision (b),[4] to "impute income to either parent based on that parent's 'earning capacity.' [Citations.]" (*Cohn, supra*, 65 Cal.App.4th at p. 927; *In re Marriage of Simpson* (1992) 4 Cal.4th 225, 227 [former Civ. Code, §§ 4801, subd. (a), 4721] (*Simpson*).) However, "in fixing child support, reliance on earning capacity must be 'consistent with the best interests of the children." (*Simpson, supra*, 4 Cal.4th at p. 233 [former Civ. Code, § 4721, subd. (f)(2), now § 4058, subd. (b)].)

The Family Code does not provide a definition of earning capacity. "While there is no statutory definition of earning capacity, its meaning has been well established with a three-prong test that was first articulated in *In re Marriage of Regnery* (1989) 214

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[3] All further statutory references are to the Family Code unless otherwise indicated.

[4] Section 4058, subdivision (b) provides, "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."

Cal.App.3d 1367." (*Oregon v. Vargas* (1999) 70 Cal.App.4th 1123, 1125.) " 'Earning capacity is composed of (1) the ability to work, . . .; (2) the willingness to work . . .; and (3) an opportunity to work which means an employer who is willing to hire. [Citations.]' [Citation.]" (*Id.* at pp. 1125-1126.) "This rule has been modified to include only the first and third prongs; thus, the definition of earning capacity is satisfied when the payer has both the ability and the opportunity to work. [Citation.]" (*Id* at p. 1126.)

It is therefore inappropriate to impute income to a parent based on earning capacity where the parent lacks either the ability to work or the opportunity to work. (*Cohn*, *supra*, 65 Cal.App.4th at p. 928.) The showing of opportunity to work must be based on current circumstances. (*Oregon v. Vargas*, *supra*, 70 Cal.App.4th at p. 1127.) If the case involves a parent, who, like Victor, is self-employable, the definition of " 'opportunity to work' " is "the substantial likelihood that [the parent] could, with reasonable effort, apply his or her education, skills, and training to produce income." (*Cohn*, *supra*, 65 Cal.App.4th at p. 930.)

The party seeking to impute income to a parent on the basis of earning capacity has the burden to prove, by competent evidence, that the parent has both the ability to work and the opportunity to earn the imputed income. (*In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1294; *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1329.) "[F]igures for earning capacity cannot be drawn from thin air; they must have some evidentiary foundation." (*Cohn*, *supra*, 65 Cal.App.4th at p. 931.)

Having reviewed the rules governing the court's consideration of earning capacity in determining monthly child support, we turn to Victor's contention that the trial court's finding that he has an earning capacity of $4,000 per month is not supported by substantial evidence.

D. *Analysis*

Victor asserts that the trial court's determination of his earning capacity was improperly based on his testimony that he sought to become self-employed as a licensed

contractor with anticipated monthly earnings of between $4,000 and $5,000, since his application for a contractor's license was denied. Victor therefore contends that there is not substantial evidence to support the trial court's finding that he has an earning capacity of $4,000 per month as a licensed contractor and on that basis imputing a monthly income of $4,000 and ordering him to pay guideline child support of $1,751 per month plus $49 per month towards his child support arrears. According to Victor, the trial court should have calculated his child support obligation on the basis of his weekly unemployment benefits.

Child Support Services responds that the trial court properly determined Victor's earning capacity was $4,000 per month, because he is a skilled journeyman mason and he testified that he could earning an average of $4,000 to $5,000 per month as an independent contractor. Additionally, Child Support Services asserts that under Business and Professions Code section 7048, Victor does not need a contractor's license for projects costing less than $500. According to Child Support Services, the record therefore shows that "Victor could with reasonable effort apply his journeyman mason skills to produce income."

We observe that Victor does not challenge the trial court's implied finding that he has the ability to work. Since the trial court has the discretion to consider earning capacity rather than actual income in setting child support only where the parent has both the ability to work and the opportunity to work (*Oregon v. Vargas*, *supra*, 70 Cal.App.4th at p. 1126), our analysis will focus on the evidentiary showing regarding Victor's opportunity to work.

Having reviewed the record in its entirety, we find that no evidence was presented in the proceedings below regarding Victor's opportunity to work. As we have discussed, where a parent is self-employable, the definition of " 'opportunity to work' " is "the substantial likelihood that [the parent] could, with reasonable effort, apply his or her education, skills, and training to produce income." (*Cohn*, *supra*, 65 Cal.App.4th at

p. 930.) Thus, it has been held that the earning capacity of a self-employed attorney must be based upon evidence showing "what an attorney with [the father's] background, age, qualifications, and experience could be expected to earn in his first year as a full-time solo practitioner." (*Cohn*, *supra*, 65 Cal.App.4th at p. 931.)

It also been held that the evidence that may satisfy the burden of proof regarding a parent's opportunity to work includes the parent's resume, want ads for persons with the parent's credentials, the opinion testimony of a professional job counselor that a person with the parent's credentials could secure a job with a given employer or set of employers, as well as a vocational examination. (*In re Marriage of Bardzik*, *supra*, 165 Cal.App.4th at p. 1309.)

In the present case, it was undisputed that Victor is a journeyman mason eligible for jobs paying $32 per hour though his union. Victor also testified that he had registered for the union's weekly out of work list. However, there was no evidence that any jobs for journeyman masons were available to Victor through the union or elsewhere. And, as Victor points out, although he testified that he anticipated earning between $4,000 and $5,000 from self-employment as a licensed contractor, his application for a contractor's license was denied. Therefore, contrary to the trial court's finding, there was no evidence to show that Victor could earn $4,000 per month as a self-employed licensed contractor. The argument of Child Support Services that Victor could obtain an unspecified amount of income as an unlicensed contractor from projects costing less than $500, pursuant to Business and Professions Code section 7048, must be rejected as mere speculation, since there was no showing that Victor could obtain such jobs with reasonable effort.

In short, Child Support Services presented no evidence to support its claim that Victor has the opportunity to work as a self-employed contractor earning $4,000 per month. Child Support Services also presented no evidence showing what a person with Victor's "background, age, qualifications, and experience could be expected to earn," whether through self-employment as a contractor or mason or by working for an

employer in another occupation. (*Cohn, supra*, 65 Cal.App.4th at p. 931.) We therefore conclude that the trial court's finding that Victor has an earning capacity of $4,000 per month is not supported by substantial evidence.

Since the trial court's June 8, 2009 order granting Child Support Services' motion for modification of child support and setting Victor's child support obligation at $1,751 per month, plus $49 per month towards his child support arrears, was based on the court's erroneous finding that he had an earning capacity of $4,000 per month, we will vacate the order. We will also remand the matter to the trial court for further proceedings to redetermine Victor's child support obligation in accordance with the views expressed in this opinion regarding the determination of earning capacity. During the further proceedings, each party should be allowed to submit supplementary evidence with respect to the redetermination of Victor's child support obligation.

Having reached this conclusion, we need not address Child Support Services' argument that Victor's appeal from the trial court's order regarding his child support arrears should be dismissed on the ground that the order states only the estimated total amount of arrears and is therefore not a final order.

IV. DISPOSITION

The June 8, 2009 child support order is vacated. On remand, the trial court shall redetermine appellant Victor Meras' child support obligation in accordance with the views expressed in this opinion regarding the determination of earning capacity.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DUFFY, J.